

Letter of Findings: 07-0683
Gross Retail Tax
For the Years 2004, 2005, and 2006

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ISSUES

I. Automobile Sales – Gross Retail Tax.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-3-2(a); IC § 6-8.1-5-1(b).

Taxpayer argues that the audit review erred in determining that the sales of certain automobiles occurred in Indiana and were subject to Indiana gross retail (sales) tax.

II. Ten-Percent Negligence Penalty.

Authority: IC § 6-8.1-5-1(b); IC § 6-8.1-10-2.1(a)(3); IC § 6-8.1-10-2.1(a)(4); IC § 6-8.1-10-2.1(d); [45 IAC 15-11-2\(b\)](#); [45 IAC 15-11-2\(c\)](#).

Taxpayer argues that it is entitled to abatement of the ten-percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is the owner of an automobile/broker business. Until March 2006, the business was located in Indiana. In March 2006, the business moved to an out-of-state location and taxpayer closed out its Indiana retail merchant license.

Taxpayer is a broker for used automobiles. Essentially, taxpayer acts as an intermediary between businesses which have automobiles for sale – such as automobile rental companies – and dealerships or individuals who want to acquire a particular vehicle. As explained in the audit report, "[Taxpayer] travels to auctions around the country and purchases the vehicles that each dealership requested." Taxpayer arranges for transportation of each vehicle and may also arrange for repair or reconditioning of the vehicle. All these costs are included in the price taxpayer charges. Taxpayer also sells to individual customers who are not dealerships but selling to individuals constitutes only a small portion of taxpayer's business.

The Department of Revenue (Department) conducted an audit review of taxpayer's records. The audit concluded that "taxpayer's sales tax returns and supporting documentation could not all be found." The audit found that taxpayer had underreported his sales tax liability. As a result, the Department issued proposed notices of liability. Taxpayer disagreed with the additional assessments and submitted a protest to that effect. An administrative hearing was conducted during which taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Automobile Sales – Gross Retail Tax.

DISCUSSION

Indiana imposes a sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. The use tax is imposed on the "storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2(a).

As a threshold issue, it is the taxpayer's responsibility to establish that the existing sales tax assessment is incorrect. As stated in IC § 6-8.1-5-1(b), "The notice of proposed assessment is prima evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Taxpayer maintains that there are five distinct transactions which warrant review or adjustment.

The first transaction occurred on October 11, 2004. The vehicle was purchased in Virginia, sent to a repair shop in Kentucky, and eventually delivered to a purchaser in that same state. The "Contract to Purchase" indicated that the purchaser was charged "Indiana Sales Tax" in the amount of \$1,065. However, taxpayer indicates that the "Contract to Purchase" was merely "an estimate of what the auto would cost if purchased" and that no Indiana sales tax was collected.

The second transaction occurred March 21, 2005. Taxpayer points to an error in the calculation of the tax. The net trade difference was \$6,500 not the \$7,000 originally entered on the buyer's order. Therefore, the tax amount should be \$390 not \$420.

The third transaction occurred on March 24, 2005. The vehicle was purchased in Virginia and sent to a repair shop in Kentucky. The Kentucky customer took possession of the vehicle at the repair shop. Taxpayer indicates that sales tax on this vehicle was paid to Kentucky.

The fourth transaction occurred on August 9, 2005. Taxpayer points out that the trade-in difference on this particular vehicle was \$1,095. Taxpayer indicates that the audit incorrectly calculated the sales tax on this amount as \$110.70 when the actual amount should be \$65.70.

The fifth transaction occurred on August 25, 2005. The vehicle was purchased in Kentucky and delivered to a customer located in Kentucky. Taxpayer indicates that sales tax was paid to the state of Kentucky.

Taxpayer's protest is sustained as to transactions two through five. The evidence as to transaction one is ambiguous and does not meet the statutory burden necessary to adjust the amount of sales tax attributable to that first transaction. The Audit Division is requested to review taxpayer's source documents and to make adjustments to the assessments as warranted.

FINDING

Taxpayer's protest is sustained in part and denied in part.

II. Ten-Percent Negligence Penalty.

DISCUSSION

Taxpayer believes that it is entitled to abatement of the ten-percent negligence penalty.

IC § 6-8.1-10-2.1(a)(3) requires that a ten-percent penalty be imposed if the tax deficiency results from the taxpayer's negligence. IC § 6-8.1-10-2.1(a)(4) requires a ten-percent penalty if the taxpayer "fails to pay the full amount of tax shown on the person's return on or before the due date for the return or payment."

IC § 6-8.1-10-2.1(d) states that, "If a person subject to the penalty imposed under this section can show that the failure to... pay the full amount of tax shown on the person's return... or pay the deficiency determined by the department was due to reasonable cause and not due to willful neglect, the department shall wave the penalty."

Departmental regulation [45 IAC 15-11-2](#)(b) defines negligence as "the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer." Negligence is to "be determined on a case-by-case basis according to the facts and circumstances of each taxpayer." *Id.*

IC § 6-8.1-10-2.1(d) allows the Department to waive the penalty upon a showing that the failure to pay the deficiency was based on "reasonable cause and not due to willful neglect." Departmental regulation [45 IAC 15-11-2](#)(c) requires that in order to establish "reasonable cause," the taxpayer must demonstrate that it "exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed...."

Under IC § 6-8.1-5-1(b), "The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." An assessment – including the negligence penalty – is presumptively valid.

The Department is prepared to agree that taxpayer "exercised ordinary business care and prudence" and that the penalty should be abated.

FINDING

Taxpayer's protest is sustained.

SUMMARY

Taxpayer's protest is sustained as to transactions two through five as specified in Part I of This Letter of Findings. The Department agrees that the ten-percent negligence penalty should be abated.

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